

Editor's note: Reconsideration denied by Order dated Aug. 23, 1988; motion to amend decision granted by Order dated Sept. 6, 1988 (See pages 95A and 95B below); Appealed -- aff'd, Civ.No. 88-513-HDM (D. Nev. Oct. 12, 1989), aff'd, No. 91-15372 (9th Cir., Sept. 29, 1992)

STODDARD JACOBSEN AND ROBERT C. DOWNER
v.
BUREAU OF LAND MANAGEMENT (ON Reconsideration)

IBLA 86-45

Decided July 8, 1988

Petition for reconsideration of Board decision requiring resurvey.

Petition granted; prior decision, Stoddard Jacobsen v. Bureau of Land Management, 97 IBLA 182 (1987), overruled in part.

I. Surveys of Public Lands: Dependent Resurveys

The proper standard for the Bureau of Land Management to apply in the course of a resurvey is to consider a corner existent (or found) if such a conclusion is supported by substantial evidence. "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

APPEARANCES: Burton J. Stanley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

The Bureau of Land Management (BLM) has requested reconsideration of the Board's May 8, 1987, decision in Stoddard Jacobsen v. Bureau of Land Management, 97 IBLA 182 (1987). In that opinion, a divided panel held that BLM should be required to undertake another resurvey, either dependent or independent, to ascertain the location of the boundary between sec. 4 and sec. 9, T. 11 N., R. 21 E., Mount Diablo Meridian (MDM), Nevada.

In its request for reconsideration, BLM states:

[T]he majority purports to set forth a new evidentiary test to be used in conducting resurveys of the public lands which contradict the test previously approved by this Board, the 9th [1/] Circuit

^{1/} Reference was probably intended to the U.S. Court of Appeals for the Tenth Circuit since the petition subsequently quotes at length from United States v. Doyle, 468 F.2d 633 (10th Cir. 1972).

Court of Appeals, and the unanimous position taken by the authoritative treatises in the area. The majority further misapplies or ignores the well established rule that survey monuments, when found, control over distances and calls made in the field notes of the original survey. * * *

The majority's new rule holds that a surveyor, when conducting a dependent resurvey of the public lands, may not use evidence of an original corner if its correct position cannot be determined beyond a reasonable doubt. The BLM asserts that this burden of proof cannot be practically utilized in dependently resurveying the public lands since the discrepancies inherent in original surveys, most of which were made in the late 19th or early 20th centuries, contain errors which would always create some doubt as to their authenticity. [Emphasis in original.]

(Petition at 1-2).

BLM supports the criticism of the above legal standard as set forth in the dissenting opinion to the Board's previous Jacobsen decision, in which it is said:

To determine that a corner is found does not require evidence "beyond a reasonable doubt," terminology used in the 1973 Survey Manual to help define obliterated or lost corners (see sections 5-9 and 5-20). Instead, an existent corner is defined at section 5-5 as "one whose position can be identified by verifying the evidence of the monument or its accessories, by reference to the description in the field notes, or located by an acceptable supplemental survey record, some physical evidence, or testimony." Consistent with this definition of an existent or known corner, it is said: "If there is some acceptable evidence of the original location of the corner, that position will be employed." (Emphasis added.) Restoration of Lost or Obliterated Corners and Subdivision of Sections, (1974 ed.) at 10. See also Clark on Surveying and Boundaries (3rd ed. 1959) at 365.

97 IBLA at 182, 223 n.2.

That the proper test for determining whether a corner is existent is a "substantial" evidence test is urged by petitioner in approximately five pages of excerpts from such treatises as Clark on Surveying and Boundaries, 4th ed. 464 (1976); 2/ Surveying: Theory and Practice, by Davis, Foote, and

2/ "A corner is 'existent' if its position can be identified by verifying the evidence of the monument or its accessories by reference to the description in the field notes, or located by an acceptable supplementary survey record, some physical evidence or testimony." Id. at 464.

Kelly, 5th ed. 586, 587 (1966); 3/ the Tenth Circuit's opinion in United States v. Doyle, *supra*, and prior Departmental decisions, such as J. M. Beard, 52 L.D. 451 (1928), and Robert J. Wickenden, 73 IBLA 394 (1983). 4/

In contrast to the above, it is the case that the only pronouncement connecting the "beyond a reasonable doubt" standard to the degree of evidence needed to conclude a corner is found is the Board's prior decision at issue.

[1] The Board has carefully re-evaluated its prior opinion and concludes that a new evidentiary standard was improperly set forth therein for determining whether a corner is existent. The petition for reconsideration is therefore granted. 5/

The weight of authority is convincing that the proper standard for BLM to apply in the course of a resurvey is to consider a corner existent

3/ "The facts are, however, that the original survey did contain errors and probably rather large ones if its was made during the era of the compass and link chain. Further complications may be added by directions in the description being given by magnetic bearings and the declination at the time of the original survey being unknown, or by no statement having been made as to whether the bearings of the original survey were referred to the magnetic or to the true meridian. Often large mistakes are made in transposing from one record to another or are present in the measurements of the original survey. Loss of corners, lack of reference measurements, removal or alteration of physical boundaries, conflicting testimony of persons having knowledge concerning the position of boundaries, conflicts with adjoining property, and numerous other factors may add to the uncertainties of the problem.

"At any point where the surveyor finds what he regards as positive evidence as to the original location of the corner and this location does not agree with the relocation measurements derived from the description of the property, a monument is set at the original location and new measurements of angles and distances are made to refer to the mark thus established."

Id. at 586, 587.

4/ "Where the reestablishment of a surveyed corner on a second survey is supported by substantial evidence, a protest not accompanied by acceptable conflicting evidence but principally by hearsay, does not warrant further survey or investigation of the corner." Id. at 397 (emphasis in original).

5/ Petitioner has sought reconsideration by the Board en banc. In responding to such requests, the Board follows a procedure similr to

that set forth at Rule 35(b) of the Federal Rules of Appellate Procedure. Thus, en banc consideration is not required where, as here, after full circulation of the petition and dispositive order or decision prepared by the assigned panel, no member of the Board requests a vote on whether the matter should be considered en banc.

(or found) if such a conclusion is supported by substantial evidence. 6/ Robert J. Wickenden, supra. See also Survey Manual at 5-5; Clark On Surveying and Boundaries, 4th ed. supra; Surveying: Theory and Practice, by Davis, Foote, and Kelly, supra; United States v. Doyle, supra. We so hold and the Board's prior decision is overruled to the extent it is inconsistent herewith. 7/

It is therefore incumbent on the Board to re-evaluate the evidence of record in this case as to specific disputed corners employing the proper evidentiary standard. So doing, and for the reasons previously espoused in the dissenting opinion to our prior decision, the following findings and conclusions are rendered.

6/ "Substantial evidence" is defined by the courts as "more than a scintilla but less than a preponderance" and "is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Coleman v. Gardner, 264 F. Supp. 714, 717 (D. W. Va. 1967).

7/ The dissenting opinion appears to argue that the "substantial evidence" test is unprecedented. As BLM well knows, and hence its petition for reconsideration in this case, the standard enunciated here comports with

the agency's own interpretation of the Survey Manual, which it wrote, and the actual manner in which it has consistently applied the provisions of

the manual throughout the years in thousands of survey decisions. The entire thrust of the Survey Manual is to recognize corners as existent, rather than lost, if at all possible. The Board's prior decision, requiring proof beyond a reasonable doubt that a corner is existent, understandably caused a stir among survey professionals and BLM management.

(It is noted the petition in this case is endorsed by the Director, BLM, and the Acting Assistant Secretary - Land and Minerals Management; Exh. 1, Petition for Reconsideration).

Utilization by BLM of a substantial evidence test for establishing that a corner is existent is not to be confused with the standard of review applied by the Board in adjudicating appeals from survey decisions. The Board has held that a party challenging the correctness of a dependent resurvey must show error by a "preponderance of the evidence." Peter Paul Groth, 99 IBLA 104 (1987). Thus, in an appeal from a survey decision, an appellant may be able to show that its placement of a disputed corner location is supported by substantial evidence. However, as long as BLM's placement of the corner location is also supported by substantial evidence, appellant's showing is to no avail. To prove error in the BLM decision, appellant must demonstrate by a preponderance of the evidence that BLM's placement of the corner is wrong. Similarly, where BLM has concluded in a dependent resurvey that a corner is lost, appellant may not be heard to say that it can show by substantial evidence that the corner is found. It must establish error in the BLM decision by a preponderance of the evidence.

SW Corner of Sec. 4

The 1881 field notes denote corner monumentation for the SW corner of sec. 4 to be by a "trachyte stone 24 x 18 x 12." BLM's 1982 resurvey relies on a trachyte stone measuring 22 by 17 by 9. This same stone was found by the Nevada State Highway Department in 1939. Four bearing trees were found nearby, supporting a conclusion that the foregoing stone represents the original corner monument. 8/ The Board holds BLM's decision as to the location of the SW corner of sec. 4 is supported by substantial evidence.

1/4 Corner Common to Secs. 4 & 5

Both BLM and Jacobsen and Downer claim to have located the original corner monument for the quarter corner common to secs. 4 and 5. BLM's monument is smaller than the monument described in the original survey and is of a different composition. Nonetheless, Eugene Faust, a cartographer for the State of Nevada, testified that having examined section corners of various kinds for over 35 years, he would clearly accept BLM's monument as the original corner monumentation, based on markings on the stone and other considerations. Moreover, BLM's monument stands in proper relation to the section corners one-half mile to the south and north. 9/ BLM's decision as to the location of the quarter corner common to secs. 4 and 5 is supported by substantial evidence.

1/4 Corner Common to Secs. 4 and 9

BLM submits that the quarter corner common to secs. 4 and 9 is not locatable by an original corner monument. According to BLM, it is not a lost corner, but an obliterated one whose location has been correctly perpetuated.

The controversy over this corner was discussed by the dissenting opinion in our prior decision. Therein, it was advocated that the Board

8/ Jacobsen and Downer argue that all of the bearing trees were moved in 1881, having been dragged to where found from someplace else. Absolutely no evidence was presented in support of this theory. On the other hand, it was established that part of the stump or root system of one of the bearing trees was found still stuck in the ground when the 1982 resurvey was performed. In addition, the University of Arizona Laboratory of Tree-Ring Research was able to conclude that two of the bearing trees were living specimens well into the 20th century and that the blazes on two trees were made in 1881.

9/ It is no longer disputed that the northwest corner of sec. 4 is a found corner as corroborated in BLM's 1982 resurvey. Even under the erroneous "beyond a reasonable doubt" standard, the Board's prior decision concluded the northwest corner of sec. 4 "has been found, regardless of any discrepancies in record calls to known corners." 97 IBLA at 210.

should adopt BLM's recommendation that it be allowed to re-establish the corner of secs. 3, 4, 9, and 10 by double proportionate measurement. 10/ This procedure would serve to reduce the 5-degree deflection in the south line of sec. 4 occurring between the quarter corner and the southeast corner, the principal criticism advanced by Jacobsen and Downer to BLM's placement of the quarter corner common to secs. 4 and 9.

We hereby approve the procedure previously proposed by BLM. Pursuant to the Board's de novo review authority, BLM is directed to re-establish the southeast corner of sec. 4 by double proportionate measurement so as to reduce the deflection in the south line of sec. 4.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Board's decision reported at 97 IBLA 182 (1987) is overruled in part 11/ and BLM's 1982 dependent resurvey is upheld on appeal, conditioned on the re-establishment of the southeast corner of sec. 4.

Wm. Philip Horton
Chief Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

10/ No original corner monument was found by BLM for this section corner during its resurvey. During the hearing below, the BLM official in charge of the resurvey testified that a remonumented corner was reluctantly accepted: "We did not find the corner of 3, 4, 9, and 10. We accepted evidence that was used by other people. We felt that that was not the corner but we couldn't prove it so we accepted that * * *" (Testimony of Neil R. Forsyth at 276).

11/ The prior decision is not overruled to the extent it accepted the northwest corner of sec. 4 to be a found corner. See note 9. However, the proper legal basis for such a holding, consistent with this opinion, is that there was substantial evidence supporting the conclusion, viz., "a scribed rock and bearing trees whose blaze marks were age-dated and found to have been made at the time of the 1881 original survey" (Tr. 366).

ADMINISTRATIVE JUDGE MULLEN DISSENTING:

In footnote 2 of their opinion the majority states that a corner is "existent" if its position can be identified by verifying the evidence of the monument or its accessories by reference to the description in the field notes, or located by acceptable supplementary survey record, some physical evidence or testimony.

The majority has also pronounced the standard of proof for determining that a corner is existent. It is existent "if such a conclusion is supported by substantial evidence." Under the standard set out in the majority opinion, which will be the standard of proof in all future cases, a corner will be deemed to be existent if there is substantial evidence of the existence of a monument or its accessories by reference to the description in the field notes, or located by acceptable supplementary survey record, some physical evidence or testimony to support that determination. As will be seen, the standard of proof for the determination that a corner is existent will control in all future cases, regardless of the issue.

The majority opinion is defensible when the standard of proof for an existent corner set out in the majority opinion is applied.

If the only question was whether the corner was existent there would be no problem with the majority opinion. However, it is not that simple. I fear that by winning this case, the Cadastral Survey has set the stage for a number of losses in future contests. A large hiatus now exists between the test for determining if a corner is lost and determining if a corner is existent. For those cases, the previously well-defined single standard no longer exists.

Prior to this decision the burden was on the one claiming that a monument represents the location of the corner. In Elmer A. Swan, 77 IBLA 99 (1983), this Board found sufficient evidence of the existence of a monument which represented, according to the appellant, the location of the corner in question to require a hearing before an Administrative Law Judge. However, the burden of showing by a preponderance of the evidence that the monument represented the correct position of the corner rested with the appellant. ^{1/} If the standard pronounced in the majority opinion had then been in place, our holding in that case might well have been different. Similarly, there may have been a different result in Bethel C. Vernon, 37 IBLA 226 (1978), and Alfred Steinhauer, 1 IBLA 167 (1970).

The test adopted by the majority in this case should be analyzed in light of the evidence previously needed to support a finding that a corner is "lost." In many cases, such as Crow Indian Agency, 78 IBLA 7 (1983), the contestant challenges a BLM determination that a corner is "lost." Under the standard adopted by the majority, the results would have been different. There was substantial evidence of an existent corner. The appellant had produced a monument matching the monument described in the field notes for the

^{1/} The "weight" of the burden previously imposed on a contestant is discussed below.

original survey. The Cadastral Survey postulated but presented no physical evidence that the monument had been moved. Applying the test for a lost corner, this Board upheld the Cadastral Survey determination that the corner was lost. There was sufficient evidence to raise a reasonable doubt as to the location of the corner. The evidence in support of the location of the corner at the monument was at least as strong as the evidence presented by the Cadastral Survey in this case, and the Agency arguments were very similar to that now advanced by the Cadastral Survey.

There is a logical basis for continuing to apply the standard set out in Stoddard Jacobsen & Robert C. Downer v. Bureau of Land Management, 97 IBLA 182 (1987). That basis is found in the Manual of Instructions for the Survey of the Public Lands of the United States, Technical Bulletin No. 6, BLM, 1973 (Survey Manual). As will be seen, the pronouncement in the Jacobsen & Downer case was the standard previously applied, and the pronouncement by the majority in this case is new.

When the Survey Manual was written the authors were careful to accurately define and apply the terms used in that text. A "corner," as that term is used in the Survey Manual, is not a pile of stones or other physical monument. It is a point on the earth's surface which has been identified by its relationship to other points on the earth's surface and described by giving distances and bearings from the other points. The authors gave a specific warning that "the terms 'corner' and 'monument' are not interchangeable. A 'corner' is a point determined by the surveying process. A 'monument' is the object or physical structure which marks the corner point." Survey Manual at 5-4.

After establishing the exact location of corners, a surveyor will erect a marker or "monument" at the location of each corner. The monuments are merely a physical record of the surveyor's work. In a resurvey, the surveyor goes into the field and reconstructs the survey previously conducted, reestablishing the locations of the corners established by the original survey. The existence of monuments is clearly an aid in this determination, but should not be the controlling factor.

The portion of the Survey Manual pertinent to this case was written to give guidance and directives to a surveyor performing a "reconstructive" survey. The surveyor must first determine whether the corner previously established can be identified as "existent" by comparing the written record compiled during the course of the initial survey and the physical evidence he finds on the ground. Under the standard applied prior to the holding in this case, the surveyor was able to make a "yes" or "no" decision. The location of the corner, as described in the field notes of the original survey or the plat of that survey, was deemed to be "existent" as a result of finding evidence of the monuments erected at the location of the corner and ties to other physical features described in the notes and plat. On the other hand, if the location of the corner could not be adequately established by comparison of the information found on the ground to the field notes and plat, it was deemed to be "lost."

The manual gives specific instructions as to how a corner can be determined to be "existent":

An existent corner is one whose position can be identified by verifying evidence of the monument or its accessories, by reference to the description in the field notes, or located by an acceptable supplemental survey record, some physical evidence or testimony.

Even though its physical evidence may have disappeared, a corner will not be regarded as lost if its position can be recovered through the testimony of one or more witnesses who have a dependable knowledge of the original location.

Survey Manual at 5-5.

Under the same heading - "Identification of Existent Corners" - the Survey Manual gives further guidance as to what can be deemed to be an "existent" corner:

An obliterated corner is one at whose point there are no remaining traces of the monument or its accessories, but whose location has been perpetuated, or the point for which may be recovered beyond a reasonable doubt by the acts and testimony of the interested landowners, competent surveyors, other qualified local authorities or witnesses, or by some acceptable record evidence.

A position that depends upon the use of collateral evidence can be accepted only as duly supported, generally through proper relation to known corners, and agreement with the field notes regarding distances to natural objects, stream crossings, line trees, and off-line trees blazes etc., or unquestionable testimony.

Survey Manual at 5-9.

The Survey Manual requirements for an "existent" corner are specific. The definition of an existent corner and the definition of an obliterated corner are clearly related. The last paragraph of the definition of an "existent" corner and the definition of an "obliterated" corner is a statement of the information that can be used when determining that an "obliterated" corner is "existent." 2/

2/ For older surveys the corner is rarely found to be existent based only on the findings in the field. The corner monument and ancillary monuments are often totally obliterated or partially obliterated. While the relationship between the Survey Manual description of an "existent" and an "obliterated" corner is apparent from the rest of the Survey Manual section on existent corners, the standard of proof for an obliterated corner is no

The section of the Survey Manual immediately following the section entitled "Identification of Existent Corners" is entitled "The Restoration of Lost Corners." The definition of a "lost" corner, found in this section, contains precise language setting out the standard for determining that a corner is "lost."

A lost corner is a point of a survey whose position cannot be determined beyond a reasonable doubt, either from traces of the original marks or from acceptable evidence or testimony that bears upon the original position and whose location can be restored only by reference to one or more interdependent corners. [Emphasis added.]

Survey Manual at 5-20.

If the standard adopted by the majority had not been adopted the interrelationship between the two definitions could have been easily stated. 3/ If a "lost" corner is one whose position cannot be determined beyond a reasonable doubt, an "existent" corner is one whose position has been established beyond a reasonable doubt. This is no longer the case. The proof necessary for a determination that a corner is "lost" and the proof necessary for a determination that a corner is "existent" are no longer related. Previously, if there was a reasonable doubt regarding the location of a corner, it was "lost." For an "existent" corner there can now be a reasonable doubt. The present test only requires that such conclusion be supported by substantial evidence that the monument or accessory is the same as that described in the field notes. 4/ There can and will be cases where there is both substantial evidence of the existence of a monument or accessories and a reasonable doubt that the monument or accessories are at the corner. There lies the hiatus.

The writers of the Survey Manual could have easily stated that, for a lost corner, there is no substantial evidence that the monument or accessory is the same as that described in the original field notes. There was

fn. 2 (continued)

longer related to that for an existent corner. By definition, an obliterated corner must be recovered beyond a reasonable doubt. This raises an interesting question regarding the standard of proof for a partially obliterated corner.

3/ I say that there are two. Actually there are now three. The inconsistency between the standard used by the majority when defining an existent corner cannot be used for an obliterated corner. No explanation is given for overturning the prior determination that the southwest corner of sec. 4 was obliterated. In order to reduce the 5-degree deflection, we must assume that this corner is "lost."

4/ In footnote 7 to its opinion the majority has stated that "[t]he entire thrust of the Survey Manual is to recognize corners as existent, rather than lost, if at all possible" and has further stated that this position is endorsed by the Director, BLM, and the Acting Assistant Secretary - Land and Minerals Management.

a sound and logical reason for the authors' choice of words. The basis for the standard of proof for a lost corner was in the authors' minds when they gave the admonition that the term "corner" and "monument" are not interchangeable, and is indicated throughout the Survey Manual.

A monument is a physical object which can be intentionally or accidentally moved or obliterated during the time between the original survey and the resurvey. By stating the "uncertainty" necessary for finding a corner to be lost, the authors of the Survey Manual gave the cadastral surveyor sufficient latitude to reject a monument when there is a reasonable doubt that a monument is at a corner. Under the test now adopted by the majority, a surveyor will be required to defend his determination that a corner is lost by overcoming substantial evidence that the monument or accessory is the same as that described in the field notes. A showing that there is a reasonable doubt that the monument represents the corner is no longer sufficient to overcome physical evidence of a monument.

It may be that the Cadastral Survey and the majority have equated the term "beyond a reasonable doubt" to the degree of certainty necessary for a conviction in a criminal trial. This is not the case. The standard applied in a civil matter such as this is lower than for a criminal proceeding. See generally 30 Am. Jur. 2d | 1168 (1967) and citations therein. The burden of proof required to overcome a reasonable doubt that a monument represents the location of a corner has also been stated by this Board in previous survey cases. In Elmer A. Swan, supra, we stated that the proponent of an existent corner must show that the corner is not lost by presenting clear and convincing evidence.

A surveyor no longer has the latitude he once had. He can no longer reject a monument that matches the one described in the field notes when he has a reasonable doubt that it represents the corner. If there is substantial evidence of the existence of a monument or accessory the corner will be considered "existent." The sword cuts both ways. A surveyor can no longer show, for example, that the calls in the field notes do not sufficiently match the location of the monument or accessory within a reasonable tolerance, thus creating a reasonable doubt that the corner is at the monument. 5/ If a contestant shows by a preponderance of the evidence that the

fn. 4 (continued)

I cannot disagree with that statement. My concern in this case is not directed to this concept. In order to reach their conclusion, the majority have treated a corner and a monument as being synonymous. There is no question that a monument exists in this case. A question still remains as to whether the monument is at the corner. Thus, there is still a reasonable doubt that the corner and the monument are at the same point.

5/ The factual basis for the majority holding should be carefully examined, with special attention being given to a comparison of the evidence set forth in the majority opinion (including footnote 7), to the evidence set out in Stoddard Jacobsen & Robert C. Downer v. Bureau of Land Management, supra at 211-17. This comparison will demonstrate that the discrepancies between

corner is "existent," using the standard for such determination set out in the majority opinion, he has overcome the determination that it is lost. A corner cannot be both "existent" and "lost."

The Cadastral Survey argued that a standard of proof set out in Stoddard Jacobsen & Robert C. Downer v. Bureau of Land Management, *supra*, was a "new rule." It clearly is not. The "beyond a reasonable doubt" language can be found in the definition of a "lost" corner in the Circular on Restoration of Lost or Obliterated Corners and Subdivision of Sections issued by the General Land Office on October 16, 1896. See A History of the Rectangular Survey System (BLM), at 684.

As noted above, the Administrative Law Judge's findings and the prior decision by the Board in this case were consistent with previous decisions. Under the standard applied in prior cases, the Board held that a party challenging a Cadastral Survey determination that a corner is lost must submit clear and convincing evidence that the corner is existent. 6/ They now need only present substantial evidence that the monument or accessory matches the description in the original field notes.

The Cadastral Survey freely admits that numerous discrepancies existed between the ties and physical descriptions in the field notes for the initial survey and the physical evidence found in the course of the resurvey. A review of Stoddard Jacobsen & Robert C. Downer v. Bureau of Land Management, *supra*, should leave no doubt that the facts supported the Administrative Law Judge's findings of fact. Based upon the testimony and evidence presented at the hearing, the Administrative Law Judge determined that the survey was incorrect for certain of the corners because the discrepancies between the physical evidence and the description in the original survey left a reasonable doubt regarding the location of those corners. Said

fn. 5 (continued)

the calls and descriptions in the field notes and the evidence found in the field will have no bearing on a determination that the corner is existent unless the party claiming that the corner is "lost" can present evidence to support a theory that the corner has been moved. It matters not that the bearing trees were smaller than the size stated in the field notes, or that the bearings and distances from the monument to the bearing trees did not correlate with the field notes in any respect, or that the monument was not the right size, the right composition, or marked in the manner described in the field notes. The comparison will clearly demonstrate that evidence indicating that the original survey was "sloppy" or "rushed" is sufficient to overcome gross variances between the evidence found in the field and the description of the corner or accessory in the field notes.

6/ In his decision the Administrative Law Judge found that the Jacobsen-Downer portrayal of the location of the corners more closely approximated the descriptions in the original survey notes, but that there was also a reasonable doubt that the monuments found by them were at the corners. Applying the majority standard, Jacobsen and Downer would have prevailed if the cadastral surveyor had determined the corner to have been lost.

another way, he was convinced by testimony, the documents admitted into evidence, and his field examination that the corners were "lost," as that term is defined in the Survey Manual. ^{7/}

The Administrative Law Judge's decision was well reasoned and supported by the evidence. It still is. However, the determination now made by the majority can also be supported. There was substantial evidence of the existence of monuments and accessories matching those described in the original field notes, even though there was clearly room for a reasonable doubt that the monuments were at the corners.

At this point it should be noted that when Jacobsen and Downer challenged the location of the SW corner of section 4, they claimed that it was "lost." The majority has found the corner to be "existent" because there was substantial evidence of the existence of a monument and bearing trees. As a result, a showing that there is a reasonable doubt, based upon a comparison of the findings in the field to the description of the corner in field notes will no longer be sufficient to support a determination that the corner is lost. The surveyor must overcome substantial evidence that the monument or accessories match the description in the field notes.

The primary impact of the majority decision is that, in future cases, the standard of proof for an "existent" corner and the standard of proof for a "lost" corner are no longer consistent and if an Administrative Law Judge or this Board must choose between the two, the standard of proof for an existent corner set out in the majority opinion will control. I am sure that this Board will soon see the Cadastral Survey arguing that the standard of proof for an existent corner so strongly urged upon this Board should not be applied because it had determined the corner to be lost.

—
R. W. Mullen
Administrative Judge

^{7/} Henceforth, an appellant must show by a preponderance of the evidence that a corner is "existent," using the standard of proof set out in the majority opinion. It does not mean that an appellant will have a greater burden than that imposed on the Cadastral Survey in this case when disputing a Cadastral Survey determination that the corner was "lost." A corner will be deemed to be "existent" based upon substantial evidence of the existence of a monument and/or accessories, even though the ties to the monument and the accessories are sufficiently dissimilar to raise a reasonable doubt that the monument is at the corner.

September 6, 1988

IBLA 86-45	:	
103 IBLA 83	:	
STODDARD JACOBSON	:	Resurvey
	:	
ROBERT DOWNER	:	Motion to Amend Decision
	:	
v.	:	Granted
	:	
BUREAU OF LAND MANAGEMENT	:	

ORDER

By motion filed August 29, 1988, the Bureau of Land Management (BLM), through counsel, seeks amendment of the Board's decision dated July 8, 1988, directing that BLM re-establish the southeast corner of section 4, T. 11 N., R. 21 E., MDM, by double proportionate measurement. See 103 IBLA 83, 87-88 (1988). BLM submits that in the course of undertaking the actions directed by the Board in its July 8 decision, it has now found the original corner of sections 3, 4, 9, and 10. Attached to BLM's motion is a report from BLM detailing the evidence on which the foregoing conclusion is based.

The Board's July 8 decision concluded that the southeast corner of section 4 should be reestablished by BLM by double proportionate measurement upon noting, among other things, that "[n]o original corner monument was found for this section corner during its resurvey." Actual location of the original corner would render moot any need to determine its placement through alternative means, hence, BLM's request for amendment of the Board's prior decision.

BLM's motion is well-taken. The penultimate paragraph of the Board's prior decision, found at 103 IBLA 88, is hereby amended by addition of the following concluding sentence: "Reestablishment of the southeast corner of section 4 by double proportionate measurement is required in the absence of discovery of the original corner.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Board reported at 103 IBLA 83 is amended as above described.

Wm. Philip Horton
Chief Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

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